LIBRARY
SUPREME COURT, U. S.

No. 287

No. 516, Misc.

FILED
JUL 13 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

AMERICAN PIPE AND CONSTRUCTION CO.,
Petitioner,
vs.
THE STATE OF CALIFORNIA, *et al.*,
Respondents.

AMERICAN PIPE AND CONSTRUCTION CO.,
Petitioner,
vs.
HONORABLE MARTIN PENCE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit or, in the alternative, Motion for Leave to File Petition for a Writ of Prohibition or Mandamus and Petition for a Writ of Prohibition or Mandamus.

NORBERT A. SCHLEI,
606 S. Hill Street,
Los Angeles, Calif. 90014,
GEORGE W. JANSEN,
110 Laurel Street,
San Diego, Calif. 92101,
Attorneys for Petitioner, American Pipe and Construction Co.

Sorg Printing Co. of California, Los Angeles. Phone 747-7373

SUBJECT INDEX

	Page
Motion for Leave to File Petition for a Writ of Prohibition or Mandamus	a
Petition for a Writ of Certiorari or, in the alternative, for a Writ of Prohibition or Mandamus	1
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Argument	10
I. Important Questions Are Presented Concerning the Proper Administration of Justice in Federal Courts	10
A. Multi-Party, Protracted Antitrust Cases Are Increasing in Number and Involve New Techniques Not Heretofore Reviewed by the Court	10
B. The Trial Schedule Ordered in This Case Would Make It Inherently Impossible for the Petitioner and the Individual Defendant to Be Accorded a Fair Trial	13
C. No Rational Reason Has been Advanced in Support of Simultaneous Trials	16
II. These Questions Are Properly Before the Court at This Time	20
Conclusion	23
Opinion of the Court of Appeals	A-1
Pre-Trial Order No. 17	A-11

TABLE OF AUTHORITIES CITED

Cases	Page
Beacon Theatres v. Westover, 359 U.S. 500 (1959)	2, 19
De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1945)	2, 20, 21, 22
Gillespie v. United States Steel Corp., 379 U.S. 148 (1964)	20, 22
La Buy v. Howes Leather Co., 352 U.S. 249 (1957)	12, 16, 18, 20
Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927)	20
Pacific Fire Ins. Co. v. C. C. Anderson Co. of Nampa, 42 F. Supp. 917 (D. Ida. 1942)	19
Sovereign Camp, Woodmen of the World v. O'Neill, 266 U.S. 292 (1924)	19
United States v. B. F. Goodrich, 41 F. Supp. 574 (S.D. N.Y. 1941)	19

Rules	
Rules of the Supreme Court of the United States, Rule 21	2
Rules of the Supreme Court of the United States, Rule 31	a

Statutes	
United States Code, Title 15, Sec. 1	2
United States Code, Title 28, Sec. 1254	2
United States Code, Title 28, Sec. 1407	11
United States Code, Title 28, Sec. 1651	2
United States Code, Title 28, Sec. 2101	2

Textbooks	
Handbook of Recommended Procedure in Trial of Protracted Cases, 25 F.R.D. 351 (1960)	11
5 Moore's Federal Practice, Sec. 42.01, n. 11	19

IN THE

Supreme Court of the United States

No. ..... Misc.
October Term 1968

AMERICAN PIPE AND CONSTRUCTION CO.,
Petitioner,

vs.

HONORABLE MARTIN PENCE.

Motion for Leave to File Petition for a Writ of Prohibition or Mandamus.

Pursuant to Rule 31 of the Rules of the Supreme Court of the United States, petitioner hereby moves for leave to file a Petition for a Writ of Prohibition or Mandamus directed to the Honorable Martin Pence, Chief Judge of the United States District Court for the District of Hawaii. The Petition for a Writ of Prohibition or Mandamus which petitioner proposes to file if leave is granted is set forth in the alternative in the Petition for a Writ of Certiorari or for a Writ of Prohibition or Mandamus which is attached hereto.

Respectfully submitted,

NORBERT A. SCHLEI,
606 S. Hill Street,
Los Angeles, Calif. 90014,

GEORGE W. JANSEN,
110 Laurel Street,
San Diego, Calif. 92101,

Attorneys for Petitioner, American Pipe and Construction Co.

IN THE

Supreme Court of the United States

No. .....
October Term 1968

No. ..... Misc.
October Term 1968

AMERICAN PIPE AND CONSTRUCTION CO.,
Petitioner,

vs.

THE STATE OF CALIFORNIA, *et al.*,
Respondents.

AMERICAN PIPE AND CONSTRUCTION CO.,
Petitioner,

vs.

HONORABLE MARTIN PENCE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit or, in the alternative, for a Writ of Prohibition or Mandamus.

Opinion Below.

The opinion of the Court of Appeals for the Ninth Circuit has not yet been officially reported. It is reprinted herein as Appendix A.

Jurisdiction.

The decision below was entered on April 15, 1968. No rehearing was requested. This Court has jurisdiction to grant a writ of certiorari under 28 U.S.C. §§1254 and 2101, and under Rule 21 of the Rules of this Court.

The Court also has jurisdiction to grant a writ of prohibition or mandamus under 28 U.S.C. §1651. *Cf. De Beers Consolidated Mines Ltd. v. United States,* 325 U.S. 212 (1945); *Beacon Theatres v. Westover,* 359 U.S. 500 (1959).

Question Presented.

Whether an order of a Federal District Judge purposefully designed to require a defendant to go to trial concurrently, in three seperate Federal District Courts, in related complex antitrust cases transgresses the permissible limits of judicial discretion in the administration of justice or constitutes a denial of due process of law.

Statement of the Case.

This alternative petition involves principally an order requiring petitioner to try concurrently three complex antitrust cases involving similar issues. The order was upheld by a decision of the United States Court of Appeals for the Ninth Circuit which petitioner asks this Court to review on writ of certiorari. As an alternative, petitioner asks the Court to review this case by issuing a writ of prohibition or mandamus.

These cases were originated by respondents' filing actions for damages and injunctive relief alleging violations of §1 of the Sherman Act. 15 U.S.C. §1. More than 350 plaintiffs are presently active in the litigation,

while petitioner is the only remaining corporate defendant. An officer of petitioner is involved in some of the cases and is the only other remaining defendant. Five former defendants entered into settlements shortly after the challenged order was first entered. The cases were filed in United States District Courts for the Northern District of California, the Central District of California, the Southern District of California, the Western District of Washington and the District of Oregon. With damages trebled, the claims against petitioner in these cases total an amount which, according to respondents' calculations, would bankrupt petitioner. These are, therefore, in effect, "capital" cases.

In order to coordinate and thereby expedite pre-trial processing of the cases, the Chief Judge of the Ninth Circuit caused the cases to be assigned to the Honorable Martin Pence, Chief Judge of the District of Hawaii, who was designated to sit in the various Districts in which the litigation was and is pending. In early 1965, Judge Pence assumed the responsibility for "all Western Concrete and Steel Pipe cases."

Although Judge Pence technically did not consolidate the cases, they have proceeded as if they were consolidated for purposes of discovery. The parties were ordered to utilize joint interrogatories and depositions were ordered taken on a joint basis. Many other joint activities were ordered. The parties cooperated and complied with these orders and the pre-trial preparation of the cases has been basically completed. It was in this context that the subject of trial settings arose.

In late 1966, while discovery was still in progress, Judge Pence and the parties first considered the question of trial scheduling. Counsel for respondents, who

have repeatedly rejected the idea of consolidating the cases into one for trial, as petitioner has suggested,[1] recommended instead the selection of four "bellwether cases" to be tried in sequence. In October 1966, Judge Pence established a tentative trial plan which contemplated four trials, with reasonable respites of from 60 to 90 days between each one. This type of trial plan, which envisaged partial consolidation, was and is acceptable to petitioner, although petitioner believes that one consolidated trial would best serve the interests of justice and judicial economy.

Shortly thereafter, however, Judge Pence formulated a quite different trial schedule which is the subject of this petition. Essentially, it would require petitioner to try three cases simultaneously in three different District Courts. Such a plan was first hinted at in a letter dated November 28, 1966, from Judge Pence to counsel for the litigants:

> "Mr. Cooper [Judge Pence's administrative assistant] has written you concerning the proposed agenda for the December 14 conference. The possible revision that I am considering is that of scheduling all discovery in *all* cases to be carried on simultaneously and then holding practically simultaneous trials in Seattle—with Judge Boldt sitting —San Francisco—with Judge Zirpoli sitting, and in Los Angeles—with myself sitting—sometime around October 1967. If this procedure is followed, it is anticipated that *all* cases will be ready for trial at the same time, so that if any are settled out prior to trial, other cases will be substituted for trial in their place." (R. p. 244.)

---

[1]Record, pages 273-77; 288-89; 297. (Hereinafter references to pages of the Record will be cited as "R. p. .....")

This notion of simultaneous or "practically simultaneous" trials was discussed at a December 14, 1966 and a February 3, 1967 conference involving Judge Pence and counsel for the parties. Respondents urged adoption of the plan. Petitioner objected. At the first of these two conferences, Judge Pence stated to Mr. Jansen, counsel for petitioner, who had said that he planned personally to try all of the cases:

> "The Court: Well, I can say personally that if we decide that all these cases will be tried simultaneously or practically simultaneously, that you are going to have to split yourself into three personalities and be in three different locations at one time.
>
> Mr. Jansen: Well, I think that is impossible.
>
> The Court: Well, if it is impossible, you—if we decide that it is going to be tried that way, you are going to have to decide which one you are going to try." (R. p. 248.)

Subsequently, on February 21, 1967, Pre-Trial Order No. 9 was entered, formally embodying the concept of simultaneous trials. This concept has remained in Pre-Trial Orders Nos. 10-17, the latest of which was entered May 28, 1968. Thus, Paragraph S of Pre-Trial Order No. 14, which was initially the subject of petitioner's appeal in the Court of Appeals for the Ninth Circuit, read in part:

> "S. A pre-trial conference is set for February 21, 1968, at 9:30 a.m. in San Francisco, at which time trial judges Martin Pence (D. Hawaii); George Boldt (W.D. Wash.); Alfonzo Zirpoli (N.D. Calif.) and/or such other judges as may be designated will preside. At such time the trial

judges will (a) select not less than three cases for separate trial in any district or districts as may be required; (b) select the districts in which such trials will be held; (c) select the judge to preside in each district; and (d) determine whether other cases pending in any such district should be consolidated for trial. *At such conference, a final pre-trial order shall be formulated which sets each designated case or cases for trial to commence at such time as the presiding judge shall determine, but in no event later than March 18, 1968.*" (Emphasis added.)

As stated above, an appeal from this Order was taken by petitioner and a partial stay, applicable to the trial settings but not to further pre-trial proceedings, was granted by the Court of Appeals. While that appeal was pending, Pre-Trial Order No. 15 was entered which, while somewhat different in its pertinent language and in respect of the actual trial dates set, would also have effected the result of requiring simultaneous or "practically simultaneous" trials:

"26. A pre-trial conference is set for June 5, 1968, at 9:30 A.M. in San Francisco, California, before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.) Alfonzo Zirpoli (N.D. Calif.) and/or such other judges as may be designated, present. At such time, after hearing, and consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial; (b) select the districts in which such trials will be held; (c) determine the judge to preside in each such district; (d) determine whether other cases pending in any

such district should be consolidated for trial; (e) formulate a final pre-trial order for each trial case, setting such cases for trial *at such times as will permit the orderly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968, and with each succeeding trial to commence thereafter at intervals of not less than two weeks each. . . .*"[2]

The change in emphasis which allowed for a two-week time lag at the start, with overlapping thereafter, was made in response to the wishes of respondents' counsel, as expressed in the following colloquy which occurred at a pre-trial hearing held September 7, 1967:

> "Mr. Ferguson [lead counsel for respondents]: . . . The plaintiffs have suggested that as a first of the simultaneous or nearly simultaneous trials there be selected the City of San Diego, and Calleguas Municipal Water District case, the State of California Department of Highways, and the Department of Water Resources case be consolidated for trial in the city of San Diego; and this being set for trial for January 22nd, 1968 before the Honorable Martin Pence.
>
> * * * *

---

[2]Emphasis added. This portion of the order is quoted at footnote 3 of the Ninth Circuit opinion which is reprinted *infra* as Appendix A. It has been estimated that each of the three cases will require a minimum of six to eight weeks of trial time. Paragraph 27 of Pre-Trial Order No. 17, currently in effect, is virtually identical to Paragraph 26 of Pre-Trial Order No. 15, except that it speaks of selecting "the case(s) for trial" and sets the first trial to commence no later than September 3, 1968. Pre-Trial Order No. 17 is reprinted *infra* as Appendix B.

We suggest, secondly, and with the approval of the United States Government, that their total claims involving some $8,000,000 be set for San Francisco or the second simultaneous trial. And we have suggested a date there of February 5, 1968 which I have been advised the government will be able to meet.

The Court: And why do you block that one let's say two full weeks after the January 22nd? Why do you set that out in your theory?

* * * *

Mr. Ferguson: Well, my feeling is at first that it is not as efficient to start all three of these cases actually simultaneously.

The Court: Why?

Mr. Ferguson: Well, I think for several reasons. One of the best reasons is this: As you know, all of the plaintiffs here, including the United States Government, participated in an economic survey by Dr. Lanzillotti—

The Court: Is it anticipated Dr. Lanzillotti will be on the stand for two weeks?

Mr. Ferguson: No it is not. It is not anticipated that he will be on the stand for any two weeks. But it is anticipated that he will be required at all trials, and if you did start all trials simultaneously, the probabilities are there would be a serious conflict and a delay in connection with damage testimony. It also would not give Dr. Lanzillotti a fair opportunity to have a little time between the various cases to prepare his evidence for these particular cases." (R. pp. 281-83.)

Provision for some type of a time-lag between the starting dates of each of the trials has appeared in all of the orders subsequently entered. Thus, at least the convenience of respondent's witness is to be served by the device of "practically simultaneous" (or overlapping) trials rather than fully simultaneous trials as was earlier contemplated by Judge Pence. As elaborated later in this petition, however, this time-lag does not alleviate the problem posed for petitioner by the trial schedule, and it may in fact make that problem more severe.

The Court of Appeals reviewed the merits of the cases as on petition for a writ of mandamus, rather than as on appeal. Accordingly, Judge Pence was allowed to appear as "real party in interest." He filed a brief and participated, through his administrative assistant, in oral argument. On April 15, 1968, the Court of Appeals ruled on the merits, denying the writ of mandamus and then dismissing the appeal as moot.

Argument.

I. Important Questions Are Presented Concerning the Proper Administration of Justice in Federal Courts.

A. Multi-Party, Protracted Antitrust Cases Are Increasing in Number and Involve New Techniques Not Heretofore Reviewed by the Court.

In recent years, there has been an explosion of so-called "big-case" private antitrust litigation in the Federal District Courts. This type of litigation typically has involved large numbers of plaintiffs, and even many defendants. It has been further characterized by its extension into many Districts. Generally speaking, the critical facts as to liability, and the essential issues of law, have been identical within each set of such cases, with the primary distinction from plaintiff to plaintiff being merely the nature and extent of damages if liability can be proved. The Electrical Equipment Company Antitrust cases constitute perhaps the most widely publicized of these cases. At their peak, some 1900 plaintiffs were involved in that litigation.

Because of the obviously heavy burden these multi-party protracted cases have presented to the administration of justice in Federal District Courts, the development of novel procedures for processing the cases has been the subject of several studies. One such study was instituted by a group of judges commissioned for the task by the Chief Justice of the United States and the Federal Judicial Conference. Out of the efforts of that group, and a previous inquiry conducted under the

auspices of the American Bar Association, came the *Handbook of Recommended Procedure in Trial of Protracted Cases,* 25 F.R.D. 351 (1960). The principal recommendations of these studies pertain to coordinated discovery, pre-trial proceedings and consolidation for trial. While radically innovative in some respects and somewhat conservative in others, the suggested procedures do not in any serious way prejudice the essential rights of litigants. Rather, their focus is directed towards streamlining the pretrial proceedings so that those rights—both of plaintiffs *and* defendants—will be protected by assuring rational development of the pertinent facts and early trials at which the various theories of liability and defenses can be tested.[3]

With one possible exception discussed below, this Court has not so far reviewed any case challenging the propriety of the recently developed techniques for processing "big cases". It is essential, however, that the Court exercise its supervisory authority over the federal judicial system and delineate the bounds within which traditional concepts of justice and fairness in trial procedure can be discarded and coercive methods adopted in the interest of expediency. This case, presenting as it does a coercive device that has until now been unrecommended and untried, would provide an excellent vehicle for the Court to use in assessing the need, utility

[3]Subsequent to the decision of the Court of Appeals, a statute was enacted which provides for transfer of multi-district litigation for the purposes of coordinating or consolidating pre-trial proceedings. 28 U.S.C. § 1407. The statute does not, however, cope with the problems of trial scheduling or set any guidelines of relevance to the questions herein posed.

and fairness of a number of procedural devices that are gaining increasing acceptance in the lower federal courts. It is a particularly appropriate time for the Court to grant such a review, since a new array of treble-damage cases is presently at the pleading stage in various District Courts throughout the country following in the wake of the convictions obtained by the Government in the recently-tried price-fixing cases involving the drug industry.

The one instance known to counsel in which this Court has reviewed a questionable technique employed by a District Judge in processing major antitrust litigation is *LaBuy v. Howes Leather Company,* 352 U.S. 249 (1957). There the District Judge had ordered the litigation referred to a Master for trial, citing the likely length of the trials, the complexity of the issues, and the congestion of his court calendar as reasons. A writ of mandamus against this procedure was granted by the Court of Appeals for the Seventh Circuit, and this Court affirmed. While the substance of the unfairness in the District Judge's order there was much like the unfairness here, as elaborated *infra,* the particular question reviewed by this Court was narrow in scope and limited in its context.

Until this Court provides better guidelines within which litigation of this nature may be processed and tried, each and every "big case" involving new procedures will carry the potentiality of reversal for lack of fairness in the methods employed by District Judges to prepare and try the cases. And, since such cases frequently involve lengthy trials, reversal will necessarily result in a huge amount of waste in terms of both economics and judicial manpower.

B. The Trial Schedule Ordered in This Case Would Make It Inherently Impossible for the Petitioner and the Individual Defendant to Be Accorded a Fair Trial.

Of the many unusual techniques that have been employed by Judge Pence in this case, none is so objectionable as the order that would force this petitioner to defend three virtually identical cases in three different courts at the same time. Explicitly stated in the early pre-trial order, and carried through the later orders in thinly disguised language, this trial schedule can only be designed to make it impossible for petitioner adequately to defend any of the cases, thereby putting petitioner's "feet to, not one, but three fires" and forcing it to settle for whatever it can rather than have its day in court. The impossibility of adequately defending in these circumstances, and thus the inherent unfairness of the order, manifests itself in several respects.

Perhaps the most obvious way in which this order seriously prejudices the defense lies in the fact that petitioner will be required to scatter its defense counsel. This will necessarily result in use of attorneys at several of the trials who will not have taken part in the discovery proceedings or in the strategy sessions at the pleading and discovery stages. Obviously, such counsel —whatever their credentials and abilities—will not be able to examine and cross-examine witnesses nearly so effectively as could attorneys who have been intimately involved in preparation of the defense for many months. (This form of prejudice is not in any sense the fault of petitioner, since at the discovery stage there was no suggestion that there would be simultaneous trials, and, if there had been, that prospect would not have suggested to petitioner that it should secure

additional counsel since at that time petitioner was one of six defendants and its counsel were participating in the defense with some seven major law firms representing other defendants.) Likewise, coordination of counsel's efforts will be extremely difficult, even given modern communication methods, since the day-to-day trial of a major lawsuit necessarily involves long evenings of reviewing transcripts, preparing witnesses and formulating trial strategy, leaving little if any time for discussions with others who are trying separate, albeit related, cases.

Petitioner will further be severely handicapped by the fact that some witnesses and documents will be needed in two or more districts at one and the same time. While one set of attorneys prepares to meet the next day's trial problems by consultation with witnesses, company executives and employees, and by referring to company records, the attorneys defending in the other two districts will often find themselves confronted with the need to meet with the same persons and review the same records. And even if these problems were not insurmountable, counsel at two of the trials will necessarily be denied the presence of certain key persons who could, as the trials progress, supply information and suggestions crucial to the effective cross-examination of respondents' witnesses.

But an even more crippling effect of the simultaneous trials is to be found in the impact on petitioner's use of witnesses. Obviously, the witnesses can attend only

one trial at a time. Thus, petitioner will be required to risk the wrath of the trial judges and, more importantly, the juries, by requesting frequent continuances. This problem has one other compelling aspect, because an individual (an officer of petitioner) is a defendant in several of the cases. Certainly he should be entitled to attend all of the trials in which he has a personal stake, but he will be precluded from doing so because the trials will overlap.

The unfairness to petitioner of simultaneous trials is highlighted by the fact that respondents' counsel objected to three trials beginning on the same day because of the impact on *their* use of witnesses (*supra*, pp. 7-9), and suggested a two-week time lag at the start of each case to allow respondents to use their principal expert witnesses in the most effective manner possible. The orders framed subsequently have allowed for such a time lag, thus apparently solving respondents' problem. But the time lag does not meet the needs of petitioner, and indeed may even aggravate its difficulties since the respondents, as plaintiffs in all of the cases, will have control of the timing of at least the first half of each trial. By accelerating the pace in one trial while lagging in another, they can make it impossible for petitioner to have the right people in the right places at the right times. This impossibility will be present both insofar as cross-examination of respondents' witnesses is concerned and with respect to

presentation of the defense. Even an unlimited number of continuances would not solve this problem for petitioner.

C. No Rational Reason Has Been Advanced in Support of Simultaneous Trials.

Whether simultaneous, or practically simultaneous trials in litigation of this nature can ever be justified where it would work an unfairness to either side is questionable. *Cf. LaBuy v. Howes Leather Company, supra.* Certainly the answer must be negative unless some counterbalancing, compelling reason dictates such an approach. No such reason has ever been advanced here.

The trial plan proposed by Judge Pence would not effect a saving in judicial manpower. There will be three separate trials, each requiring a presiding District Judge and a jury as well. Consolidation of all the cases would, of course, effect such a saving, and petitioner has repeatedly advocated consolidation or at least that one strong "bellwether" case be tried ahead of the others to test the various theories of liability and defenses. (R. pp. 297; 301-304.) But respondents have in each instance opposed that step, and Judge Pence has acceded to their wishes.

No fact has been brought forward indicating that any respondent would suffer hardship by a reasonable spacing of the trials. Respondents are not "little" companies who have suffered severe economic losses as a result of alleged antitrust violations and who need an immediate award of damages or a substantial settlement in order to remain solvent. They consist, in the main, of municipalities and other governmental units

who are quite able to survive through whatever period would be required to complete a reasonable trial schedule. The time required for each trial—estimated at six to eight weeks—is not such as to require simultaneous trials in order to avoid unconscionable delay. Indeed, the discovery in these cases has been accelerated so that they are ready for trial well in advance of the norm for complex litigation. While the rush to prepare may well have prejudiced petitioner in some respects, the prejudice has not been nearly so great as that which would result from simultaneous trials.

The only possible reason, then, that can underlie the unusual trial plan formulated by Judge Pence is that it will force petitioner to settle these cases rather than risk losing everything in a situation where rational trial strategy is impossible. The inference that this purpose motivated Judge Pence can be drawn from the record. For example, the following comments were made at a pre-trial hearing on September 7, 1967, before Judge Pence:

> "Mr. Jansen [Counsel for Petitioner]: But I am a little disturbed and a little surprised at Counsel's reasons for wanting to have these cases tried the way he suggests.
>
> Because larded throughout these reasons he repeats the phrase 'in the absence of a reasonable and rational offer of settlement. . . .'
>
> And he talked, too, about taking over our business.
>
> He says right here about putting American out of business, and all that, and he keeps repeating the fact that the real reason he wants these cases

tried this way is to try to force us to settle the cases.

Now, your Honor—

The Court: Well, I won't let all of that blame fall upon Mr. Ferguson.

You remember away back when I told you then —and it has been understood since that time, and I will say it later on today, we are going to have practically simultaneous trials." (R. pp. 298-299.)

To bludgeon a defendant into giving up its right to test its facts and theories before a court and a jury must be considered arbitrary and capricious action, if not a denial of fundamental constitutional rights. In the words used by the Court in *LaBuy v. Howes Leather Company, supra,* at 256, the order amounts

> "to little less than an abdication of the judicial function depriving the parties [here petitioner and the individual defendant] of a trial before the court on the basic issues involved in the litigation."

The arbitrariness of the planned trial schedule becomes even more apparent when the context in which it was adopted is compared with the situation that would be presented had these cases not been initially brought under the unified control of Judge Pence, but instead had proceeded through pre-trial activities under the guidance of separate District Judges. If, in the supposed situation, all of the cases became ready for trial at the very same time, surely petitioner would be

granted some kind of relief. Perhaps two of the actions would be stayed pending the outcome of the third. *Cf. United States v. B. F. Goodrich,* 41 F. Supp. 574 (S.D.N.Y. 1941); *Beacon Theatres v. Westover,* 359 U.S. 500, 508 (1959).[4] Absent such rulings, petitioner might be granted a change of venue in two of the actions, bringing them into a single District so that all could be consolidated for trial. 5 *Moore's Federal Practice* ¶42.02 n. 11. Or, petitioner might be granted relief in the nature of a bill of peace. *Cf. Sovereign Camp, Woodmen of the World v. O'Neill,* 266 U.S. 292 (1924);[5] see also *Pacific Fire Ins. Co. v. C. C. Anderson Co. of Nampa,* 42 F. Supp. 917 (D. Ida. 1942). If such types of relief from simultaneous trials would be available in the hypothesized situation where the problem occurs by accident, it is inconceivable that a District Judge could be allowed to create the same prejudicial context by his own deliberately conceived orders. This Court must afford a remedy from such a gross abuse of judicial discretion.

---

[4]In the course of the *Beacon Theatres* opinion Mr. Justice Black stated:

> "On proper showing, harassment by threats of other suits, or other suits actually being brought involving the issues being tried in this case, could be temporarily enjoined pending the outcome of this litigation." 359 U.S. at 508.

[5]Petitioner does not contend that the actions here were fraudulent and part of a conspiracy as was alleged in *O'Neill.* But the respondents themselves here have speculated in their briefs that these actions in the aggregate might well result in petitioner's economic ruin; the substance of this latter factor was also present in *O'Neill.*

II. These Questions Are Properly Before the Court at This Time.

The Court of Appeals for the Ninth Circuit has rendered a decision to the effect that the District Judge's plan to require petitioner to try three cases at once should not be disturbed at this time. That decision is reviewable on certiorari despite the fact that it is not, in a classic sense, a final decision disposing of the merits of the litigation. See *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1945); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). The only complication to review by certiorari inheres in the fact that the District Judge, subsequent to the Ninth Circuit decision, entered Pre-Trial Orders Nos. 16 and 17[6] superseding Pre-Trial Order No. 15 which was the particular Order reviewed by the Ninth Circuit. The later orders, however, did not alter the substance of the matter of which petitioner complains, nor did they give any indication that Judge Pence would retreat one inch from his determination to force petitioner to undergo concurrent trials.

The opinion below was posited in large measure on the belief that an experienced trial judge "upon further consideration" might decide "to restrict" the overlapping trials or to eliminate the overlap entirely and, sensibly, "provide an interval between trials." But, the entry of the subsequent orders (Nos. 16 and 17), which are substantively unchanged, demonstrates that Judge Pence has a closed mind on the subject. The other avenue of relief envisaged by the opinion below (*i.e.*, that Judge

[6]Pre-trial Order 17 is reprinted herein as Appendix B.

Pence and the other two trial judges might reject the concept of concurrent trials when sitting individually rather than as a committee) is illusory. Reason dictates that the two consulting trial judges are in full sympathy with the concept of simultaneous trials. If they were not, it is more than likely that Judge Pence would have selected substitutes. Thus, it taxes credulity to believe that when each of these three judges assumes control of his own docket he will reverse his field and afford petitioner relief. The identity in practical effect of the present order and the order reviewed by the Ninth Circuit, as well as the scope of the opinion below, should, therefore, lead to the conclusion that review by certiorari would be appropriate. If, however, the Court believes that effective relief could not be granted on certiorari because of the intervening new orders, it may assume jurisdiction by reviewing all of the orders on writ of prohibition or mandamus directed to Judge Pence. *Cf. De Beers Consolidated Mines, Ltd. v. United States, supra.*

Whichever jurisdictional approach is taken, it is critical that the Court grant review now rather than waiting until the litigation is finally determined on the merits of the underlying claims. The issues now in controversy will not be merged into a final judgment on the merits and will not easily lend themselves to review at a later date. Petitioner might well win some of the cases and lose others, or win all, or lose all, and it will be difficult, if not impossible, to determine the impact of the prejudice from case to case. More importantly, assuming petitioner loses all of the separately tried cases, each will be considered individually on appeal. The record in each case will reflect only the comments and rulings of the trial judge who presided in that par-

ticular case, and the variety of factors prejudicially affecting the defense and cutting across all of the cases will necessarily often not be apparent from the record. Consequently, the appellate court will not be able to consider the overall flavor of prejudice which the challenged order creates. Piecemeal review after trial will therefore come too late, and this is the only occasion on which the Court will be able to consider fully the important questions presented in their proper context. Moreover, the order for simultaneous trials is "fundamental to the further conduct of the case" and threatens irreparable harm to petitioner. It should, therefore, be reviewed now. *Gillespie v. United States Steel Corp., supra, at 154; De Beers Mines, Ltd. v. United States, supra.*

Two additional considerations argue persuasively in favor of assumption of jurisdiction by the Court now. Should the order for simultaneous trials go unreviewed by the Court at this time, petitioner may indeed be forced to settle for whatever it can, giving up its fundamental right to a full and fair trial and rendering future review of the order impossible. On the other hand, should petitioner not cave in so easily but instead try each of the cases for the six to eight weeks of trial time per case that is now forecast, a subsequent reversal would involve tremendous waste in terms of economics and manpower, both for the courts involved and for the parties.

Conclusion.

For the reasons stated above, petitioner urges the Court to grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, or, in the alternative, to grant review by Writ of Prohibition or Mandamus.

Dated: July 11, 1968.

Respectfully submitted,

NORBERT A. SCHLEI,
606 S. Hill Street,
Los Angeles, Calif. 90014,

GEORGE W. JANSEN,
110 Laurel Street,
San Diego, Calif. 92101,

Attorneys for Petitioner, American Pipe and Construction Co.